IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1037 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT – Appellant

Versus

JAYNATIBHAI MAGANBHAI PATEL - Opponent

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Appearance :
MR. K.C. SHAH, LD. APP for Appellant State.

MR DK MODI for Respondent.
MR MD MODI for Respondent.
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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 29/08/2005

ORAL JUDGMENT

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1.The Appellant State of Gujarat has preferred this appeal under section 378 of the Code of Criminal

Procedure, challenging the order in judgment dated 17-6-1992 passed by Learned JMFC, Balasinor in Criminal Case No. 985 of 1990 acquitting the present respondent – original accused for the offence under section 2(1A) (A) & (M), and section 2 (9) (D) of Mis-Branded and Rule 44(c); and punishable under section 7(1)(2) and (5) with section 16 (1A) (1) (2) of Prevention of Food Adulteration Act, 1954. This Court (Coram: B.J. Shethna, J) vide order dated 15-12-1992 granted leave and admitted the appeal.

2. The case of the prosecution in short is that the original complainant - Food Inspector on 4-5-1990 at about 12.45 noon visited the shop of the original accused – respondent run in the name of Laxmi Dairy Farm situated opposite Swaminarayan Temple at Balasinor. Original complainant – Food Inspector purchased 450 grams pure ghee from the accused on payment of Rs.28=80 and obtained receipt of the payment and issued notice under Form-12 as per law indicating the accused that the collected sample was to be sent for analysis to the Public Analyst. The collected sample of pure ghee thereafter was divided into three parts and taken into clean, odorless, dried and

transparent glass bottles. The Food Inspector then applied proper seal and wrapped it in accordance with the provisions of law and one part of the sample was sent to Public Analyst for analysis and the remaining two parts were sent to Local Health Authority in compliance with the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as the “Rules”). On receipt of the report from the Public Analyst dated 2-6-1990 the Food Inspector obtained proper consent from the competent authority for prosecuting the accused – present respondent. The complaint came to be lodged on the basis of the evidence on record and also the sanction at exhibit-35 for lodging the prosecution. The matter proceeded further. The notice as envisaged under section 13 (2) affording an opportunity to the accused for having the sample tested at the end of Central Food Laboratory was issued, and as it appears from the record, the original accused availed the opportunity of having the sample tested from the Central Food Laboratory. The report of the Central Food Laboratory is produced on record at exhibit-8. Exhibit-6 is in respect of procedure carried out for sending sample by the respondent to the Central Food Laboratory. The accused denied the charge and the

matter had proceeded further. The charge is at exhibit-39. The trial Court has framed two issues, namely (1) whether the prosecution proves beyond doubt that the accused had in breach of section 2 (1A) (A) and section 2(9)(D) of the Food Adulteration Act, 1954 and Rule 44 (c)of the Rules sold the sample food article to the Food Inspector and thereby committed offence punishable under section 7(1) (2) & (5) and 16 (1A) (1)(2) of the Prevention of Food Adulteration Act; (2) what order ?.

The first issue is answered in negative and the second, as per his order.

3. After discussing the matter in detail, the learned trial judge acquitted the present respondent – original accused of the charges levelled against him. The State being aggrieved by the said acquittal order dated 17-6-1992 in Criminal Case No. 985 of 1990, has preferred the present appeal.

4. Learned APP Shri. Shah has vehemently submitted that the reasoning adopted by the trial court is not supported by provisions of law, and therefore, the order of acquittal deserves to be reversed and as the

sample food article - pure ghee is proved to be adulterated and as it is not conforming with the standards laid down under the Rules and as the certificate of Central Food Laboratory being conclusive the accused be convicted and visited with appropriate punishment.

5. Shri. Shah has further submitted that the testimony of the witness, especially one Shri. Tajuddin Samsuddin Kazi and Food Inspector – original complainant would go to show that there is complete compliance with the PFA Act & Rules and therefore, the report of the Central Food Laboratory declaring that the sample food article has been adulterated ought to have been believed as sufficient proof to bring home conviction of the accused. Mr. Shah has submitted that,the trial court, therefore, patently erred in not accepting the version of the prosecution and convicting the accused.

6. That the trial court ought not to have relied upon the report of Public Analyst when Central Food Laboratory report was available on record. He has further submitted that the trial court has erroneously held that the report of the Director of Central Food

Laboratory is erroneous. Shri. Shah has further submitted that the trial court ought not to have relied upon the submission of the defence that there was breach of section 13 (2) and Rule 4(3) of the Rules in sending sample to the Central Food Laboratory.

7. Shri. Shah has further submitted that in view of these, and especially on the fact that the conclusive certificate of Director, Central Food Laboratory terming the sample food article to be adulterated, coupled with the fact that the testimony of the witness saying that there was absolute compliance with the Rules, the judgment & order of acquittal of the trial court impugned in the present appeal requires to be reversed; and in view of the report of the Central Food Laboratory the accused deserves to be convicted and visited with appropriate punishment.

8. Shri. Modi, learned counsel appearing on behalf of the respondent – original accused has submitted that this being an acquittal appeal this Court may not disturb the finding, the reasoning and even the conclusion of acquittal unless & until it is cogently established by the prosecution that the judgment & order of acquittal

suffers from patent illegality and perversity causing grave miscarriage of justice. In absence of any such pleading, the order of acquittal deserves to be maintained.

9. Shri. Modi has submitted that the acquittal appeal can be disposed of on the ground and reasoning that may be independent and different from those adopted by the trial court. Shri. Modi has submitted that the entire appeal can be disposed of on respondent – original accused establishing that the prosecution has failed in proving complete compliance with mandatory provisions of section 13 (2) and Rule 4 (3) of the Rules. Shri. Modi has submitted that the deposition of the witness which has been discussed by the trial court in para-7 would conclusively go to show that the trial court has not applied its seal on the container which is mandatory requirement under the law. Shri. Modi has submitted that a close perusal of the discussion in para-7 of the judgment would lead to only one conclusion that the court did apply its seal on the outer cover but the container which contained the sample food article was left as it is which was bearing only the seal of the Food Inspector. This omission in

the procedure of sending the sample food article to Central Food Laboratory be considered to be fatal and, therefore, on this count also it can be well said that the prosecution has failed in establishing this case beyond reasonable doubt, the benefit of doubt therefore deserves to be accorded to the accused in maintaining the acquittal order. Shri. Modi has submitted that this Court has in terms held that the requirement of Rule 4 and section 13 (2) is to the effect that the court under section 13 (2) of the Act and under Rule-4 is duty bound to apply its seal on the container and also on the outer cover while dispatching the same to the Director, Central Food Laboratory. Shri. Modi has relied upon the decision of this Court in case of SHRIRAM HARICHAND GUJARAL Vs. STAE OF GUJARAT, reported in 17 G.L.R. pg. 434, wherein the Division Bench has categorically held that a duty is cast upon the trial court to affix its seal on both, i.e., the container and the outer cover. The Division Bench in case of STATE OF GUJARAT Vs. BHUPENDRA M. MEHTA, 1999(2) FAC 201 held that if the record shows that there is violation of Rule 4 of PFA Rules in as much as the report of the Director, Central Food Laboratory does not disclose as to whether the seal was properly

applied,in that case the benefit of doubt shall go to the accused.

10. Shri. Modi has relied upon a judgment of this Court in case of JUTHALAL LALLUBHAI Vs. BARODA MUNICIPAL CORPORATION & ANR., reported in 19 G.L.R. pg. 448 in support of his submission that, once it is established that there is breach of mandatory provisions of PFA Act or Rule then the factum of actual prejudice caused to the accused pales into insignificance. In view of this, Shri. Modi submits that the judgment & order of acquittal impugned in the present appeal deserves to be maintained and the appeal deserves to be dismissed.

11. This court has perused the record & proceedings and the evidence on record as well as heard the learned counsels at length. The submission of Shri. Modi that the entire appeal could be disposed of only on the ground that the prosecution has failed to establish beyond doubt that Rule 4 of the PFA Rules and section 13 (2) of the Act were absolutely complied with while sending the sample food article to Central Food Laboratory deserves to be considered.

12. The Rule 4 of the PFA Rules 1955 is held to be mandatory. Rule 4 read as under.

> **4. Analysis of food samples -** (1) (a) Samples of food for analysis under sub-section (2) of Sec. 13 of the Act shall be sent either through a messenger or by registered post in a sealed packet, enclosed together with a memorandum in Form I in an outer cover addressed to the Director.
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> (b) Samples of food analysts under sub-section (3) of Sec. 6 of the Act or under Cl. (a) of rule 3 shall be sent either through a messenger or by a registered post in a sealed packet enclosed together with a memorandum in Form I-A in an outer cover addressed to the Director.
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> (2) The container as well as the outer covering of the packet shall be marked with a distinguishing number.
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> (3) A copy of the memorandum and a specimen impression of the seal, used to seal the container and the cover shall be sent separately by registered post to the Director.
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> (4) On receipt of a package containing a sample for analysis, the Director or an officer

authorised by him shall compare the seals on the container and the outer cover with specimen impression received separately and shall note the condition of the seals thereon.

(5) After test or analysis, the certificate thereof shall be supplied forthwith to the sender in Form II.

(6) The fees payable in respect of such a certificate shall be [Rs.1,000] per sample of food analysed.

(7) Certificates issued under these rules by the laboratory shall be signed by the Director. “

Thus, the Rule 4 (1)(b) (2) clearly makes it incumbent upon the trial court to mark the container as well as the outer covering of the packet with a distinguishing number. The Rule-4 also provides that the seal of the court is required to be affixed on the container which contains the sample food article and the outer cover which carries the said container. The judgment relied upon by Shri. Modi in case of Shriram Harichand (supra) though is on the aspect that a copy of the memorandum and specimen

impression of the seal used to seal the container and the cover shall be sent separately to the Director, Central Food Laboratory, is in terms contains the observation which can be culled out from the text of the judgment that the trial court is duty bound to mark the container as well as the outer covering of the packet with distinguishing number. The relevant observation which contain the aforesaid observation deserves to be set out from the text of judgment of Shriram Harichand (supra) as under:-

> “.... It is only when the Court is satisfied that the mark and seal or fastening up are intact that the Court seals the sample part delivered to the vendor or produced by the complainant before the Court and despatches it for analysis to the Director. They have, therefore, held that the expression “despatch the part of the sample under its own seal” means in the context of sub-sec. (2) of sec. 13 that the Court must apply its own seal both to the container and the outer cover. Dealing with rule 4 it has been observed by this Court that it provides that a sample for analysis should be sent through a messenger or by registered post in a sealed packet with a memorandum in form I

in outer cover addressed to the Director. In the context of sub-rule(3) of rule 4 with which we are concerned in this reference it has been observed by this Court that it provides that a copy of the memorandum and a specimen impression of the seal used to seal the container and the cover shall be separately sent to the Director by registered post. Next, this Court has further observed that the scheme of sub-rule (3) of rule 4 is that the Court will have to send along with a copy of the memorandum of specimen impression of the seal used by the Court to seal the container and the outer cover. The seal on the outer cover may be damaged in transit or may be tampered with. Therefore, sub-rule (4) of rule 4 requires the Director to specifically examine the inner seal on the container and to note its condition. Taking into account the consequences flowing from the certificate issued by the Director this Court has taken the view that the requirement of sending a copy of the memorandum and a specimen impression of the seal of the Court to the Director cannot be directory. It is mandatory. Since in a case of this type the conviction of the accused shall rest upon the certificate issued by the Director which in its turn is a conclusive evidence of the facts stated therein it is quite obvious that all legal requirements laid down in that behalf must be strictly complied with. ..... The next safe-guard which is provided is in sub-rule (2) of rule 4 which requires the Court to mark the

container as well as the outer covering of the packet with a distinguishing number. “

Thus it can be said that the Court has to affix the seal and distinguishing number to the container and the outer cover both. In the instant case as could be seen from the testimony of witness Shri. Tajuddin Samsuddin Kazi discussed by the trial court in para-7, the prosecution has failed in establishing complete compliance with provisions of Rule-4 in as much as the fact um of affixing distinguishing number on the container and the court seal on the container have not been conclusively established.

13.This Court in case of STATE OF GUJARAT Vs. BHUPENDRA M. MEHTA, reported in 1999(2) FAC, 201 has observed as under.

“ 6. From the report of the Central Food Laboratory, it is clear that the Central Food Laboratory has mentioned the condition of the seals on the container and the outer cover on receipt, as under:-

“ The seals on sample container were intact and

tallied with the specimen impression of seal given in copy of Form VII. The seals on outer cover of sample parcel were also intact and tallied with the specimen impression of seal given on copy of memorandum forwarded separately. “.

7. Learned Advocate further submitted that on receiving an application for forwarding the sample to the Central Food Laboratory, it is necessary for the Court to call for the sample from the Local (Health) Authority, and on receipt of the part of the same form the Local (Health) Authority, the Court has to ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of Section 11 of the Act are intact and the signature or thumb impression, as the case maybe, is not tampered with. After satisfying this, the Court has to despatch the part of the sample under its own seal to the Director of Central Food Laboratory. In the instant case there is nothing to indicate that the trial Court has followed the procedure as stated herein above. This Court could have, with the aid of Section 114(e) of the Evidence Act, presumed the procedure to have been followed, but in the instant case, there is nothing on the record to show that the Court while forwarding the sample has forwarded separately the memorandum to the Director of Central Food Laboratory in Form 1. Rule 4(i)(a) of the Rules contemplates that the sample of food for analysis

under sub-section (2) of Section 13 of the Act shall be sent either through a messenger or by registered post in a sealed packet, enclosed together with a memorandum in Form I in an outer cover addressed to the Director. Sub rule (2) of the Rule 4 requires that the container as well as the outer covering of the packet shall be marked with a distinguishing number. Under Section 13(2-B), duty is cast upon the Court to ascertain that mark and seal or fastening as provided in clause (b) of sub-section (1) of Section 11 are intact and the signature or thumb impression as the case may be, is not tampered with. The legislature provided that after verifying these aspects the Court has to dispatch the part, or as the case may be, one of the parts of the sample under its own seal to the Central Food Laboratory. The Court has to forward a copy of the memorandum and specimen impression of the seal used to seal the container separately by registered post to the Director under sub-rule (3) of Rule 4. Duty is cast on the Director or the officer authorised by him to compare the seals on the container and the outer cover with specimen impression received separately and also to note the condition of the seals thereon. In the instant case, as stated in the foregoing paragraph it is mentioned in the analysis report of the Central Food Laboratory that the seals were intact and tallied with the specimen impression. It is clear that Form No. VII was forwarded. Form No. VII in accordance with Rule 17 is required to be forwarded to the Public Analyst by the Food Inspector

concerned and not by the Judicial Magistrate First Class. Mr. Vora submitted that if the report would have indicated that the Central Food Laboratory received the memorandum separately in Form I, then certainly this Court can draw a presumption that memorandum was forwarded separately and with specimen impression of the seal used to seal the container. However, in absence of any material on record to indicate that the Court forwarded sample under its own seal or forwarded memorandum as contemplated under Rule 4(1) of the Rules; it would not be possible to come to a conclusion that the Court forwarded the sample under its own seal. It appears that breach of Section 13(2-B) is committed in so far as forwarding the sample under Court's seal is concerned. Central Food Laboratory in its report has referred to Form No. VII but not Form No.1, and therefore, under the circumstances, it is not possible to say that while forwarding the sample, the Court forwarded the same under its own seal. In the case of **Bhagwandas Gurnomal v. State reported in 1974 FAC 373**, learned Single Judge referred the matter to a Larger Bench wherein four issues were raised, one of which reads as under :-

> “Whether sub-rule (3) of Rule 4 imposes a statutory obligation on the learned Magistrate to send to the Director of Central Food Laboratory, a copy of the memorandum along with the specimen of the seal of the food inspector used to seal the container or along with the seal of the Magistrate only”.

8. The Division Bench, after considering in detail relevant provisions of the Act and the Rules, held that “Justice must also appear to be done, and, therefore, the only interpretation that can be put on the mandatory provision of Section 13(2) and relevant Rule 4(3) is that the Court's seal has to be applied both to the container and the paper cover and it is the specimen impression of the Court seal which has to be sent separately by registered post to the Director along with a copy of memorandum under Rule 4(3). That is why even the memorandum in Form 1 in terms provides that a copy thereof and a specimen impression of seal used on the container and the cover by the Court shall be sent separately by registered post. That seal is clearly Court's seal within the meaning of Section 13(2) and Rule 4(3)”.

9. It is clear that there is nothing to indicate that Court applied its own seal after ascertaining the facts that seal was intact and there was no tampering with signature or thumb impression. Record indicates that Court merely forwarded the sample with the memorandum having a seal of the Food Inspector. In view of this, no reliance can be placed on the certificate. “

14. Shri. Shah, learned APP has strenuously urged that the document at exhibit-6 would go to show that the court had applied its seal on the container as well as

on the outer cover. Shri. Shah has in alternative submitted that the testimony of Tajuddin Samsuddin Kazi at exhibit-43 and the forwarding document exhibit-6 coupled with the discussion of the trial court in para-7 would go to show that the trial court did its duty and applied seal on both the container as well as the outer cover and, therefore, the same should be believed. In alternative, it is submitted by Shri. Shah that, in absence of any plea with regard to any actual breach caused to the accused because of non applying of seal in the container, the accused can not be permitted to go scot free when serious offence of adulteration is levelled against him. Shri. Shah's alternative submission is squarely answered by the judgment of this Court in case of Juthalal Lallubhai Vs. Baroda Municipal Corporation & Anr (supra).

15. In view of the aforesaid discussions, this Court is of the view that the judgment & order of acquittal dated 17-6-1992 passed in Criminal Case No. 985 of 1990 does not call for any interference.

16. In the result, the appeal deserves to be dismissed and is dismissed accordingly.

[S.R. BRAHMBHATT, J]

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